

TAB

INTERAGENCY CLASSIFICATION REVIEW COMMITTEE
WASHINGTON, D.C. 20408

MINUTES OF THE DECEMBER 11, 1973
MEETING OF THE INTERAGENCY CLASSIFICATION
REVIEW COMMITTEE

Attendees:

James B. Rhoads, Acting Chairman
William L. Brown, Executive Director
David O. Cooke, Defense
Mark Feldman, State
Charles L. Marshall, AEC
Douglas Marvin, Justice
James E. O'Neill, Archives
Marvin Smith, NSC Staff
John S. Warner, CIA

Joseph L. Liebling, Defense
Mark Spiegel, State
Ethel R. Theis, ICRC Secretary

Dr. Rhoads opened the meeting and made the following announcements:

1. As a result of a telephone poll of the membership, the DOD's amended information security program regulations were unanimously approved by the ICRC subject to certain minor clarifying changes.
2. A request for progress reports on the status of each agency's data index system as of December 31, 1973, was sent out to all reporting agencies. These reports are due back by January 28, 1974.
3. In order to determine the reliability of the information being received, a request for a report on each agency's inspection and sampling programs was sent out. The report on sampling programs was required only from those agencies using such programs in lieu of an actual count for their Quarterly Summary Reports.
4. All agencies with deficiencies in their quarterly reports were notified and supplemental reports are coming in. Bill Brown is beginning to review the reports to monitor the effectiveness of each agency's program.
5. A tabulation program is in the process of being set up to record statistics received from the quarterly reports. This will allow us to get a better handle on how successfully the Executive order is being implemented and it will facilitate access to various statistics.

2

Minutes of the Previous Meeting

Mr. Marshall requested that his comment on page 3 be amended as follows: "Mr. Marshall stated that since the proper timing of the release of the documents was causing the delay in the actual release and since the delay was already quite lengthy and was at the root of the problem that now existed with the requesters, they should be informed immediately that the documents cannot be declassified at this time, but that when circumstances change so as to permit such a release, the documents will be made available."

The Minutes of the November 7th ICRC meeting were then approved as amended.

Stueck and LaFeber Appeals

Dr. Rhoads asked the Committee members if they had all received copies of the memorandum from Dr. Kissinger on the Stueck and LaFeber appeals pending before the ICRC as well as copies of the agenda file. They had. Dr. Rhoads then proposed that a vote be taken to make a formal decision on the appeals.

Mr. Feldman questioned the significance of taking a vote on the appeals since Dr. Kissinger's memorandum recommended that the documents remain classified. Mr. Feldman added that he would like to have a full discussion on the matter and that he would also like to have more information that would help them present the case to Dr. Kissinger once more. Mr. Feldman emphasized that, in particular, he wanted to discuss the significance of any decision that the Committee members might reach. He went on to say that he would be very interested in hearing the comments of the other Committee members on the two appeals. A lengthy discussion ensued.

Mr. Warner commented that Mr. Feldman's question, though a complex one and not easy to answer, was a good one. Mr. Warner added that he also wanted to know what would be the purpose of a formal vote.

Mr. Marshall said that he believed that there was a purpose for the vote. He pointed out that one question which must be answered was whether the Committee is an independent body or not. He added that there has been some indication that it is an independent body and that various government agencies are part of that body. He said that the question then becomes: Can the Committee be overruled by the NSC? If it cannot, then a vote should be taken.

Mr. Feldman wanted to know to whom such a vote would be directed.

Mr. Brown stated that, as he understood it, the ICRC was an arm of the NSC; when the ICRC acts it is the NSC acting and the ICRC has been created to do the job and should assume the responsibility for doing it. Since

3

the ICRC does not operate in a vacuum, it would necessarily always get input from whatever Governmental departments had a prime subject interest. In the case of an NSC input, as opposed to an NSC staff input, the NSC input would probably be decisive since the NSC is the parent body of the ICRC.

Mr. Marshall said that if what Mr. Brown had stated was correct then there was no need to take a vote in such a case.

Mr. Brown responded that, as a matter of procedure, he felt the ICRC was required to exercise the function it had been delegated by the NSC Directive.

Mr. Warner said that the ICRC had already voted, in January 1973, to recommend that the NSC declassify the documents in question. Several members pointed out that the January vote was a recommendation only and not a final decision.

Dr. O'Neill indicated that one aspect of the Executive order is the public information policy aspect. This was shown by the President's desire to link the Executive order with the Freedom of Information Act. It was his opinion that if Dr. Kissinger's view was upheld without a formal vote by the Committee, the Committee would be weakening the public policy the President was trying to establish. He felt, that, at least, the Committee should go through the procedural formality of taking a vote. Mr. Warner stated that he did not see it that way. Mr. Spiegel said that he believed that Dr. Kissinger was speaking in his memorandum as a Presidential adviser rather than as a NSC official.

Mr. Feldman said that he was unclear as to whether Committee decisions were final on Departmental documents. Dr. Rhoads felt the Committee decisions were final within the Executive branch and that, if the ICRC did not exercise its role and authority, the value of the ICRC as a regulating body would be nil.

Mr. Feldman also wanted to know if there was a definition anywhere for "Presidential documents," if the issue of Presidential papers had arisen before and, if so, what is the Archives duty towards them? He also stated that he still had some doubts as to whether the ICRC's decisions are final. Dr. O'Neill responded that any White House documents that are in the custody of NARS are subject to the provisions of Executive Order 11652 which requires the Archives to consult with the agencies involved. Mr. Feldman expressed his belief that the NSC is an agency in the sense that the Department of State is an agency. However, Mr. Feldman wanted to know if the NSC was an arm of the President and to what an extent the NSC has control over documents of Presidents in office. Mr. Feldman

4

added that if the NSC is an agency given declassification authority, it means that the NSC would be an agency or department for the purposes of Executive Order 11652. Mr. Brown agreed saying that this was reflected in the NSC Directive.

The next question raised by Mr. Feldman was: In what role was Dr. Kissinger speaking and how was all this related to the NSC. This would have a bearing on how to present the matter to Dr. Kissinger for further review if such was deemed necessary. Mr. Marshall pointed out that this was a complicated question because of the fact that Dr. Kissinger holds more than one position. He went on to suggest that, since the Committee had a note from Dr. Kissinger acting on behalf of the NSC, perhaps the Committee should go ahead and vote formally on the papers; then the Committee could ask the Justice Department to look at the matter and, at a future meeting, have a representative of the Justice Department attend the meeting to tell the Committee what had been concluded as a result of the Justice Department review. He then suggested that further discussions on the matter be terminated until that time. Mr. Feldman disagreed with this. He wanted to continue discussing what the issue would be after a vote had been taken. He believed that it was necessary to know the options. Dr. Rhoads felt that the ICRC had to eventually get some authoritative legal guidance on the matter and, to that extent, he expressed his agreement with Mr. Marshall's proposal.

Mr. Warner questioned the NSC's independent authority and stated that the Committee should regard Dr. Kissinger's memorandum as if he were acting for the President. Dr. Rhoads said that, from the standpoint of good procedure, the Committee should still take a vote on the appeals.

Mr. Feldman asked why had this matter been brought up before Dr. Kissinger in the first place. Dr. Rhoads answered that Ambassador Eisenhower had taken the position that the vote of the ICRC is binding in all cases except with respect to NSC documents. Ambassador Eisenhower believed that, as far as NSC documents were concerned, the only thing the ICRC could do was to recommend that the documents be opened.

Mr. Cooke then questioned the administrative finality of ICRC decisions. He pointed out that the ICRC was created to assist the NSC and he believed that the use of the word "assist" was, in effect, a limitation on the ICRC. Mr. Brown stated that he believed that interpretation of the meaning of the word "assist" could only be made in the context of the entire Executive order and implementing NSC Directive. He quoted Sec. IX.D of the NSC Directive as an example of more definite language covering ICRC responsibilities. Mr. Cooke said that he believed that ICRC decisions are only valid insofar as there is consultation with the concerned agency. If the agency disagrees with the ICRC's position then the Committee can take the issue to the NSC.

It was pointed out that the NSC had already delegated the ICRC certain powers and responsibilities through the NSC Directive and that such powers and responsibilities remain in effect until revoked or amended. A brief discussion ensued on whether or not the ICRC could then be legally required to take action. Mr. Marshall reiterated his view that the ICRC is not a body subject to the NSC but rather to the President. He stated that there are members in the ICRC that are also members of the NSC but that fact was not related to the Committee's authority on releasing documents.

Mr. Feldman raised the question of whether the absence of a vote on the Stueck and LaFeber appeals could itself be considered an action. Dr. Rhoads stated that he did not believe that would be satisfactory and said that he felt that the Committee should still take a vote on the appeals. Dr. O'Neill emphasized the need to do so from the procedural standpoint. Dr. Rhoads went on to say that the public perception of the Committee's role had not come up in this meeting. However, he believed the Committee could very well get a black eye if its members do not act as they are supposed to. A brief discussion was then held on which of the appeal documents had already been published. Mr. Smith pointed out that Dr. Kissinger obviously had no intention of reclassifying the documents which had already been declassified and his memorandum was not intended to cover such.

Dr. Rhoads stated that he believed that the time had come for the Committee to vote as he believed it was required to do. It was the general consensus that a vote was in order. The Committee then voted unanimously in favor of retention of the classification on the documents which were the subject of the Stueck and LaFeber appeals.

New Business

The next order of business was the publication of an ICRC pamphlet. Mr. Brown asked if the Committee members thought it would be a good idea for the ICRC to issue a pamphlet for the use of authorized classifiers within the Government. Mr. Brown added that he would be happy to prepare the pamphlet if the Committee members felt it was a good idea.

Dr. Rhoads went on to explain that the pamphlet would be aimed more at the agencies that are not members of the ICRC. He said that there have been, for example, cases in which agencies with no Top Secret classifying authority have exempted documents. Dr. Rhoads expressed himself in favor of publishing such a pamphlet. The pamphlet would be geared to the smaller agencies so as to assist them to comply with the mandates of Executive Order 11652. It was the consensus of the membership that Mr. Brown should carry out the preparation of such a pamphlet. Mr. Cooke suggested that Committee members could offer material to help Mr. Brown with its preparation. Mr. Brown agreed that such would be helpful.

6

The Committee next discussed the advisability of changing the format of the minutes or maintaining the already established format. After some discussion, it was decided to keep the format of the minutes unchanged.

The next order of business was Mr. Brown's request that the Committee approve an amendment to the ICRC's February 27, 1973, Letter of Instructions on the Quarterly Reporting System which would require negative reports from those agencies receiving no mandatory review requests. This was necessitated by the fact that several agencies had failed to report even though they had received such requests. Also, negative reports were already required for the other quarterly reports when there was nothing to report. The Committee approved the amendment.

Mr. Brown then stated that he would like to discuss the role of the Executive Director with the Committee. He said that he saw the role as having several aspects - one of those aspects being that, on behalf of the Committee, the Executive Director oversees agency compliance with and implementation of Executive Order 11652 and the programs established thereunder. One of the ways this is done is through review and analysis of the quarterly reports furnished by each department or agency dealing with classified information. He said that he saw his responsibility in this area divided into three parts: (1) making sure that each agency reports quarterly, (2) making sure that the statistics furnished in the reports are reliable, and (3) where the reports reflect a lack of full compliance with the Executive order and Directive pointing this out and pushing, when necessary, for the agency's compliance. Mr. Brown said that he would like to know if any Committee members had any objection to this. He said that he believed he could only carry out these responsibilities to the satisfaction of the Committee if he had a mandate from the Committee to do so even though it could involve pointing out deficiencies to certain agencies represented on the Committee. He stated, however, that he did not want to do anything which was not responsive to the desires of the Committee. Mr. Feldman pointed out that this was exactly how he saw the role of the Executive Director. Others agreed. There were no objections. Dr. Rhoads stated that it was clear that Mr. Brown had a mandate to do the job required. Mr. Brown indicated his willingness to assist any agency in ironing out any deficiencies.

The meeting was then adjourned.